

Case C-475/23

Request for a preliminary ruling

Date lodged:

25 July 2023

Referring court:

Curtea de Apel Cluj (Romania)

Date of the decision to refer:

3 July 2023

Applicant and appellant

Voestalpine Giesserei Linz

Defendants and respondents

Administrația Județeană a Finanțelor Publice Cluj

Direcția Generală Regională a Finanțelor Publice Cluj-Napoca

[...]

CURTEA DE APEL CLUJ

SECȚIA A III-A CONTENCIOS ADMINISTRATIV ȘI FISCAL

(Court of Appeal, Cluj, Third Division for Administrative and Tax Matters)

[...] ORDER

Public hearing of 3 July 2023

[...]

The appeal lodged by the appellant VOESTALPINE GIESSEREI LINZ GMBH against civil judgment No 9/2023 delivered on 9 January 2023 by the Tribunalul Cluj (Regional Court, Cluj) [...] in proceedings against the respondents ADMINISTRAȚIA JUDEȚEANĂ A FINANȚELOR PUBLICE CLUJ (Regional Public Finance Administration, Cluj) and DIRECȚIA GENERALĂ REGIONALĂ A FINANȚELOR PUBLICE CLUJ-NAPOCA (Regional Directorate-General of Public Finances, Cluj-Napoca) — concerning an appeal against a tax administrative act - decision No 35/3.2.2022, assessment notice F-CJ 855/11.10.2021 and tax inspection report — was examined.

The course of the proceedings, the arguments and the forms of order sought by the parties were recorded in the minutes of the hearing of 19 June 2023, whereupon the court, which required time to give its decision and to give the parties the opportunity to submit written observations, stayed the proceedings following a request for a preliminary ruling from the Court of Justice of the European Union [...] on 3 July 2023.

THE COURT

I. Succinct presentation of the facts and procedure in the main proceedings

1. In this case, the appellant – VOESTALPINE GIESSEREI LINZ GMBH ('Voestalpine') – sought, in proceedings against the respondents – THE REGIONAL DIRECTORATE-GENERAL OF PUBLIC FINANCES, CLUJ-NAPOCA, and THE REGIONAL PUBLIC FINANCE ADMINISTRATION, CLUJ – the annulment of assessment notice F-CJ_855/11.10.2021 rejecting the appellant's request for a refund of VAT in the amount of Romanian lei (RON) 282 601.

2. The appellant is a legal person resident in Austria and is part of the Voestalpine group, active in the production of various cast products weighing over 10 tonnes. The appellant is registered for VAT in Romania. The appellant sends various parts to Romania for processing, declaring an intra-Community acquisition. The parts are processed in Romania by the staff of the Romanian company 'Global Energy Products' SA ('GEP'), which is a subcontractor of Austrex Handels GmbH ('Austrex'). After the transactions are carried out by GEP, the parts are dispatched and invoiced by Voestalpine [...] to Voestalpine Austria and other customers in the EU area.

3. On 24 March 2021, the appellant was automatically registered as having a permanent establishment from 24 March 2021 onwards. Disagreeing with that decision by the tax authorities, the appellant appealed against it, and by civil judgment No 2014/21.7.2022 of the Regional Court Cluj [...], which became final pursuant to judgment No 1135/10.11.2022 of the Cluj Court of Appeal, it was held that the appellant's registration as having a permanent establishment in Romania was lawful.

4. A framework contract for the supply of goods was concluded between the appellant and the subsidiary Austrex, under which Austrex, as the supplier of steel-product processing activities, in particular the cast products of Voestalpine Giesserei, in Austria and Romania, undertook to fulfil the appellant's orders for goods and services, and was given authority to use another company, namely GEP, for that purpose. In order to provide those services, the appellant granted [the company] Austrex a right of enjoyment, transferable to GEP, of a building situated in Cluj-Napoca, which the appellant in turn leased from 'Voestalpine România' Srl (subsequently, in 2016, the appellant purchased the property). The

subject matter of the contract consists, inter alia, in the processing, testing, polishing, electric arc welding, welding by other means, sand-blasting and heat treatment of cast products.

5. The appellant and Austrex concluded a loan agreement concerning the building situated at Bd. (avenue) Muncii No 18, Cluj-Napoca. Under the contractual provisions, routine maintenance work on the building and on the equipment located therein was the responsibility of Austrex, while repairs for serious damage or substantial deterioration were the appellant's responsibility.

6. For June 2021 the appellant recorded a deficit with option for a refund, and it was therefore the subject of an advance tax inspection. The VAT refund concerned the following invoices: delivery of 50-tonne bridge crane; assembly, commissioning of 50-tonne bridge crane and approval by ISCIR [State inspectorate of boilers, pressure vessels and lifting equipment]; rental of load mass test stand; fifth inspection of 50-tonne crane; repair of crane in the warehouse located at No 18 Bd. Muncii. Specifically, the refund requested concerns the purchase of a crane which the applicant placed in the building that was made available to [the companies] Austrex and GEP, a crane used in the operations carried out on the appellant's parts by employees of [the company] GEP.

7. The tax authorities found that even though, at the time of the refund application, the appellant was registered with a permanent establishment in Romania, it did not act as such from an accounting or tax point of view and did not draw up accounting statements showing the revenue and costs entered in the accounts. Taking this into account, as well as the fact that the premises are made available to the company Austrex free of charge, the tax inspection unit took the view that the appellant had not provided evidence that the purchases in question had been made for the purposes of carrying out its economic activity, which is why it was not granted the right to deduct the sum of RON 282 601.

8. The appellant challenged the tax assessment rejecting the application for a VAT refund, as set out in paragraph 1.

9. By civil judgment No 9/2023 of the Cluj Regional Court, the appellant's action was dismissed at first instance. In arriving at that conclusion, the Regional Court held, in essence, that the appellant had failed to provide evidence that the purchases in respect of which it had sought deduction of VAT had been made for the purposes of its taxable transactions, in view of the fact that the documents made available to the tax authorities did not show any revenue generated by the appellant as a result of its activity in Romania. Similarly, it was considered that the activity carried out in Romania generated revenue for the appellant only indirectly; Austrex and its subcontractor, GEP, were the direct beneficiaries, and they both issued invoices for operations for which the crane was used.

10. The appellant appealed against judgment No 9/2023 of the Cluj Regional Court. In the course of the appeal proceedings, the appellate court raised the

question of how to interpret the EU law applicable in the present case and invited the parties to consider the need to make a reference to the Court of Justice of the European Union for a preliminary ruling.

II. Provisions of national law relied on

11. Pursuant to Article 297(4)(a) of the Codul fiscal (Tax Code):

Every taxable person has the right to deduct tax on purchases where they are intended for the following transactions: taxable transactions.

12. Pursuant to point 67 of the Normele metodologice (Methodological standards) for the implementation of Title VII of the Tax Code, approved by Hotărârea Guvernului No 1/2016 (Government Order No 1/2016):

(1) The right of taxable persons to deduct the tax paid or payable on goods/services purchased which are intended to be used for the purposes of the transactions referred to in Article 297(4) of the Tax Code is a fundamental principle of the VAT system. The right of deduction laid down in Article 297 of the Tax Code is an integral part of the VAT scheme and in principle may not be limited. That right shall be exercised immediately in respect of all the taxes charged on transactions relating to inputs. In order to benefit from the right of deduction, the substantive conditions must first be satisfied, as is clear from the case-law of the Court of Justice of the European Union. First, the person concerned must be a taxable person under Title VII of the Tax Code and, secondly, the goods or services relied on to give entitlement to that right must be used by the taxable person for the purposes of the transactions referred to in Article 297(4) of the Tax Code and, as inputs, those goods or services must be supplied by another taxable person.

(2) According to the settled case-law of the Court of Justice of the European Union, the competent tax authorities may refuse to grant the right of deduction where it is shown, in the light of objective factors, that that right is being relied on for fraudulent or abusive ends.

(3) The relevant case-law of the Court of Justice [of the European Union] for the purposes of applying paragraph 2 shall include, by way of example, the judgments in Bonik, C-285/11, and PPUH, C-277/14.

13. Article 8(1) and (6) of the Tax Code provides:

(1) For the purposes of this Code, a permanent establishment is a place where all or part of a non-resident's activity is carried out, either directly or through an employee. The definition of 'permanent establishment' takes into account the commentary on Article 5 'Permanent establishment' of the Model Double Taxation Convention of the Organisation for Economic Co-operation and Development.

(6) *A non-resident shall not be regarded as having a permanent establishment in Romania if he or she carries on his or her activities in Romania only through a broker, agent, general commission agent or intermediary with an independent status, where that activity is the agent's usual activity, in accordance with the description given in the constitutional documents. Where the activities of such an agent are carried out wholly or almost entirely in the name of the non-resident, and conditions existing in the commercial and financial relations between the non-resident and the agent differ from those which would exist between independent persons, that agent shall not be regarded as an independent agent.*

III. Succinct presentation of the reasoning in the request for a preliminary ruling

14. The Court of Appeal considers that, in the present case, the refusal of the tax authorities to recognise the right to deduct VAT was based on two main arguments: first, that the expenditure in respect of which the right to deduct was exercised was for the benefit of the taxable transactions of the appellant's subcontractors and not for that of the appellant's taxable transactions; secondly, that the appellant did not keep separate accounts for the permanent establishment in Romania and, for that reason, the tax authorities could not verify the labour costs applicable to the cast products owned by the appellant or, for that matter, the entire processing activity carried out on Romanian territory.

15. In that context, the Court of Appeal considers that two questions arise as to how the provisions of Title X of Council Directive 2006/112/EC on the right of deduction of VAT should be interpreted.

16. The first issue concerns the person who has the right of deduction of VAT in the present case, where the appellant has purchased an asset that it has made available to a subcontractor that carries out activities in favour of the appellant, which are then invoiced in terms of the latter. Two interpretations are possible: first, that the appellant has purchased the asset for the purposes of its taxable transactions, so that it is necessary for it to make the asset available in order for the subcontractor to be able to carry out the activity; secondly, that the asset is not used in service of the appellant's taxable transactions, but that of the taxable transactions of the subcontractor which, in practice, has been aided free of charge by the appellant to carry out the activities that, subsequently, are invoiced to the appellant, and with the subcontractor receiving the same cost as if it had held the asset from the outset.

17. Closely related to this issue is the possibility of limiting the right of deduction on the ground that the appellant refused to keep separate accounts for its permanent establishment in Romania. The tax authorities maintain that that omission on the part of the appellant made it impossible to verify the labour costs for the parts brought into Romania. In that context, it should be noted that any answer to the question referred to in the preceding paragraph, namely whether the

purchase of the crane benefits the appellant, which pays lower labour costs than [it would have paid] if the subcontractor had purchased the crane, or, on the contrary, whether it pays the same costs, in which case it is the subcontractor that benefits from the purchase of the crane, depends precisely on the examination of the labour costs.

IV. Questions referred for a preliminary ruling

1[8]. In the light of the foregoing, the Court of Appeal considers it necessary to refer the following questions to the Court of Justice of the European Union for a preliminary ruling:

[...] [the text of the questions is set out in the operative part below]

THE COURT ORDERS THAT

The following questions are hereby referred to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 TFEU:

- 1. Do the provisions of Council Directive 2006/112/EC on the right to deduct VAT preclude a national practice whereby, if a company purchases goods which it then makes available to a subcontractor free of charge so that the subcontractor may carry out activities for the first company, that company is refused the right to deduct the VAT on the goods purchased, on the grounds that the purchase is deemed not to be for the purposes of its own taxable transactions but for the purposes of the subcontractor's taxable transactions?*
- 2. Do the provisions of Council Directive 2006/112/EC on the right to deduct VAT preclude a national practice whereby a taxable person is refused the right to made deductions on the grounds that he or she has not kept separate accounts for his or her permanent establishment in Romania, thus preventing the tax authorities from verifying the costs of the labour used for the cast products of which the owner is [that taxable person], let alone the entire processing activity carried out in Romanian territory?*

[...] [procedural provisions; signatures]